

September 30, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 08-4396

RECEIVED Page 1
WILLIAM H. FAUVER, CLERK

2008 OCT 29 12 5: 00

UNITED STATES
DISTRICT COURT

In Regard to the Matter of:

Bayside State Prison Opinion/Report
Litigation of the
 Special Master

JAMES CLARK,

-vs-

WILLIAM H. FAUVER, et al,
Defendants.

* * * *

TUESDAY, SEPTEMBER 30, 2008

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

MASTROTANNT & FORMAROLI, INC.
Certified Court Reporting & Videoconferencing
251 South White Horse Pike
Audubon, New Jersey 08106
856-546-1100

September 30, 2008

Page 2

1

2

3

4

5

6

7

8

9

10 A P P E A R A N C E S:

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Transcript of proceedings in the above

matter taken by Theresa O. Mastroianni, Certified

Court Reporter, license number 30X100085700, and

Notary Public of the State of New Jersey at the

United States District Court House, One Gerry Plaza,

Camden, New Jersey, 08102, commencing at 10:30 AM.

LOUGHRY & LINDSAY, ESQUIRES

BY: LAWRENCE W. LINDSAY, ESQUIRE

330 MARKET STREET

CAMDEN, NEW JERSEY 08102

856-968-9201

ATTORNEYS FOR THE PLAINTIFFS

RODNEY D. RAY, ESQUIRE

32 NORTH BLACK HORSE PIKE

BLACKWOOD, NEW JERSEY 08012

856-232-3337

856-232-4561

ATTORNEYS FOR THE PLAINTIFFS

ROSELLI & GRTEGEL, PC

BY: JAMES LAZZARO, ESQUIRE

- and -

BY: KENNETH LOZIER, ESQUIRE

1337 STATE HIGHWAY 33

HAMILTON SQUARE, NEW JERSEY 08690

609-586-2257

ATTORNEYS FOR THE DEFENDANTS

September 30, 2008

Page 3

1 JUDGE BISSELL: Mr. Ray, any additional
2 evidence to be presented on behalf of Mr. Clark.

3 MR. RAY: Judge, that's all I have.

4 JUDGE BISSELL: Mr. Lozier?

5 MR. LOZIER: Your Honor, at this time I
6 would make a motion pursuant to local Rule 52C. I
7 would argue, your Honor, that based on the
8 plaintiff's own testimony, he admits that he was told
9 at least three times, once prior to going into the
10 bunks in the trailer and twice while in the trailer
11 to lie down on his bunk. He did not do so. And as a
12 result, the officer used very minimal, at best, at
13 worst, quite frankly, force which had a valid
14 penalogical purpose. And I would, based on that, I
15 would ask the court to dismiss the complaint.

16 In the alternative, just based on the
17 plaintiff's own testimony, there is no -- there was
18 no objective credible medical evidence of any
19 permanent injury and, in fact, he candidly said that
20 he couldn't tell us and he can't because he's not a
21 doctor that the problem that he still experiences
22 once in a while, as he phrased it, could be from his
23 activities. There is no way to know. And the burden
24 is on the plaintiff to establish that.

25 And so in the alternative, I would also

September 30, 2008

Page 4

1 argue that it's a deminimis jury and at best, a one
2 dollar award. Thank you.

3 JUDGE BISSELL: All right. Thank you.
4 Mr. Ray?

5 MR. RAY: Thank you, judge. I ask that
6 you consider some key points in my client's
7 testimony.

8 One, immediately prior to being struck
9 by the officer, he attempted to comply. In fact, as
10 he was complying is when the officer struck him in
11 the back. Also, I ask that you consider there was no
12 threats, no resistance at all in this case.

13 Plaintiff described intense pain for
14 two weeks immediately after being struck. And, in
15 fact, there was an additional -- I'd say
16 approximately two weeks of residual pain. So from a
17 deminimis standpoint, judge, I ask that you consider
18 the fact that there was intense pain involved here
19 and it did last for approximately a month.

20 With that, judge, I ask that you allow
21 the plaintiff's position to continue.

22 JUDGE BISSELL: As we know, Rule 52(c)
23 of the Federal Rules of Civil Procedure states in
24 relevant part, and I quote: "If during a trial
25 without a jury a party has been fully heard on an

September 30, 2008

Page 5

1 issue and the court finds against the party on that
2 issue, the court may enter judgment as a matter of
3 law against that party with respect to a claim or
4 defense that cannot under the controlling law be
5 maintained or defeated without a favorable finding on
6 that issue, or the court may decline to render any
7 judgment until the close of all of the evidence.
8 Such a judgment shall be supported by findings of
9 fact and conclusions of law as required by
10 Subdivision (a) of this rule."

11 I'm going to grant the motion.
12 However, I'm invoking as well, as I have in my
13 plenary decisions, Local Civil Rule 52.1 which as we
14 know states that: "When an oral opinion is given in
15 lieu of a written opinion and is transcribed, the
16 reporter shall submit it to the judge for revision
17 before it is filed." My remarks here will be
18 reviewed to assure us that there has been the
19 presentation which Rule 52(c) of the Federal Rules of
20 Civil Procedure contemplates.

21 First, I make note of the fact that I
22 find Mr. James' testimony credible. I observed his
23 demeanor on the television screen, he answered the
24 questions directly put to him, he did not seek to
25 embellish any events, he did not seek to assert

September 30, 2008

Page 6

1 before me, for instance, prolonged, continuing,
2 residual, crippling injuries, if you will. He
3 described the single incident that serves as the
4 basis for his claim here, namely upon his return to
5 his unit.

6 To some extent he became a victim of
7 circumstances in that when directed, as he was indeed
8 three times, to lie down on his bunk, he was faced
9 with something that wasn't that easy to accomplish
10 given the fact that his property was on the bunk and
11 that his mattress was folded up over the top of that
12 property. He undertook a reasonable action in the
13 first instance sitting on his bed maintaining the
14 subservient position, if that's the way to put it, of
15 his head down and his hands behind his back.
16 However, he was further directed to lie on his bunk.

17 He could have, of course, moved his
18 property around on the bunk, even if he was worried
19 about being criticized for putting it on the floor
20 and still would be in a position to lie down, at
21 least for a short time. He chose not to do that.
22 Eventually when SOG officers were called because he
23 had not laid down on his stomach with his face in the
24 pillow on his bed as the other inmates in the wing
25 were being instructed and apparently had done, the

September 30, 2008

Page 7

1 SOGs acted somewhat swiftly and, indeed, abruptly by
2 sweeping his property off the bunk onto the floor.

3 It's not clear to me that he remained
4 seated on the edge of his bunk and was still seated
5 there when this took place. But it would appear that
6 that was so and thus rather than rolling over on his
7 bunk which he could have done, he stood up. I find
8 that, particularly at this time, to wit, the first of
9 August, two days after the murder of Officer Baker,
10 the fact that he was standing up, even though in his
11 mind he was preparing to lie down, could well be
12 interpreted by an officer in charge (as one of the
13 SOGs units was here) as a further act of
14 insubordination or at least as generating an
15 uncertainty as to whether he was going to lie down on
16 his bunk at that time as instructed or not.

17 I determine that it was not
18 unreasonable by any means for the officer at that
19 point to conclude that it was necessary to employ
20 some form of corporal enforcement of the order to get
21 down on his bunk face first with his hands behind
22 him. Mr. Clark was struck once in the back to
23 enforce that order. It surprised Mr. Clark who
24 wasn't expecting it. Of course, it had the intended
25 result, which he said he was planning to do anyway,

September 30, 2008

Page 8

1 and I have no reason to disbelieve him.

2 So that I find that at most here there
3 may have been a misinterpretation by the officer of
4 Mr. Clark's action, but not an unreasonable
5 misinterpretation and not an unreasonable response
6 under the circumstances. We're not dealing here with
7 excessive force, sadistically employed with a purpose
8 of inflicting pain and under the Eighth Amendment
9 visiting quasi punishment upon Mr. Clark.

10 Under all of the facts and
11 circumstances as recited here, I determine that
12 excessive force was not employed on Mr. Clark. I
13 make these plenary findings pursuant to Rule 52(c)
14 because of the fact that Mr. Clark was fully heard on
15 the issue and rested. But I want, as I said, to make
16 it clear that I'm not at all finding Mr. Clark's
17 testimony incredible or exaggerated. It's just that
18 based on the manner in which he himself described
19 these events, he has not sustained his cause of
20 action for an Eighth Amendment violation here. And
21 that will be my recommendation to the district court.
22 My recommendation is that the District Court "enter
23 judgment as a matter of law against" Mr. Clark on his
24 claims in this case and thereby dismiss this action.
25 Federal Rule of Civil Procedure 52(c).

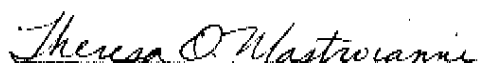
September 30, 2008

Page 9

C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and
Certified Shorthand Reporter of the State of New
Jersey, do hereby certify that the foregoing is a
true and accurate transcript of the testimony as
taken stenographically by and before me at the time,
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a
relative nor employee nor attorney nor counsel of any
of the parties to this action, and that I am neither
a relative nor employee of such attorney or counsel,
and that I am not financially interested in the
action.



Theresa O. Mastroianni, C.S.R.

Notary Public, State of New Jersey

My Commission Expires May 5, 2010

Certificate No. XT0857

Date: October 1, 2008

September 30, 2008

10

<p>A</p> <p>abruptly 7:1 accomplish 6:9 accurate 9:6 act 7:13 acted 7:1 action 1:2 6:12 8:4,20,24 9:11 9:14 activities 3:23 additional 3:1 4:15 admits 3:8 al 1:9 allow 4:20 alternative 3:16 3:25 Amendment 8:8 8:20 answered 5:23 anyway 7:25 apparently 6:25 appear 7:5 approximately 4:16,19 argue 3:7 4:1 assert 5:25 assure 5:18 attempted 4:9 attorney 9:10,12 ATTORNEYS 2:14,18,23 Audubon 1:21 August 7:9 award 4:2</p>	<p>best 3:12 4:1 BISSELL 1:16 3:1,4 4:3,22 BLACK 2:16 BLACKWOOD 2:16 bunk 3:11 6:8 6:10,16,18 7:2 7:4,7,16,21 bunks 3:10 burden 3:23</p> <p>C</p> <p>C 2:10 9:1,1 called 6:22 Camden 2:8,13 candidly 3:19 case 4:12 8:24 cause 8:19 Certificate 9:21 Certified 1:20 2:4 9:4 certify 9:5,9 charge 7:12 chose 6:21 circumstances 6:7 8:6,11 Civil 1:2 4:23 5:13,20 8:25 claim 5:3 6:4 claims 8:24 Clark 1:7 3:2 7:22,23 8:9,12 8:14,23 Clark's 8:4,16 clear 7:3 8:16 client's 4:6 close 5:7 commencing 2:8 Commission 9:20 complaint 3:15 comply 4:9 complying 4:10 conclude 7:19 conclusions 5:9</p>	<p>consider 4:6,11 4:17 contemplates 5:20 continue 4:21 continuing 6:1 controlling 5:4 corporal 7:20 counsel 9:10,12 course 6:17 7:24 court 1:1,20 2:5 2:7 3:15 5:1,2 5:6 8:21,22 credible 3:18 5:22 crippling 6:2 criticized 6:19 C.S.R 9:19</p> <p>D</p> <p>D 2:15 date 9:8,21 days 7:9 dealing 8:6 decisions 5:13 decline 5:6 defeated 5:5 Defendants 1:10 2:23 defense 5:4 demeanor 5:23 deminimis 4:1 4:17 described 4:13 6:3 8:18 determine 7:17 8:11 directed 6:7,16 directly 5:24 disbelieve 8:1 dismiss 3:15 8:24 district 1:1,2 2:7 8:21,22 doctor 3:21 dollar 4:2</p>	<p>E</p> <p>E 2:10,10 9:1,1 easy 6:9 edge 7:4 Eighth 8:8,20 embellish 5:25 employ 7:19 employed 8:7,12 employee 9:10 9:12 enforce 7:23 enforcement 7:20 enter 5:2 8:22 ESQUIRE 2:12 2:15,20,21 ESQUIRES 2:11 establish 3:24 et 1:9 events 5:25 8:19 Eventually 6:22 evidence 3:2,18 5:7 exaggerated 8:17 excessive 8:7,12 expecting 7:24 experiences 3:21 Expires 9:20 extent 6:6</p> <p>F</p> <p>F 9:1 face 6:23 7:21 faced 6:8 fact 3:19 4:9,15 4:18 5:9,21 6:10 7:10 8:14 facts 8:10 FAUVER 1:9 favorable 5:5 Federal 4:23 5:19 8:25 filed 5:17 financially 9:13</p>	<p>find 5:22 7:7 8:2 finding 5:5 8:16 findings 5:8 8:13 finds 5:1 first 5:21 6:13 7:8,21 floor 6:19 7:2 folded 6:11 force 3:13 8:7,12 foregoing 9:5 form 7:20 FORMAROLI 1:20 forth 9:8 frankly 3:13 fully 4:25 8:14 further 6:16 7:13 9:9</p> <p>G</p> <p>generating 7:14 Gerry 2:7 given 5:14 6:10 going 3:9 5:11 7:15 grant 5:11 GRIEGEL 2:19</p> <p>H</p> <p>H 1:9 HAMILTON 2:22 hands 6:15 7:21 head 6:15 heard 4:25 8:14 hereinbefore 9:8 HIGHWAY 2:21 Honor 3:5,7 HONORABLE 1:16 Horse 1:21 2:16 House 2:7</p>
<p>B</p> <p>back 4:11 6:15 7:22 Baker 7:9 based 3:7,14,16 8:18 basis 6:4 Bayside 1:5 bed 6:13,24 behalf 3:2</p>				<p>I</p> <p>immediately 4:8</p>

September 30, 2008

11

<p>4:14 incident 6:3 incredible 8:17 inflicting 8:8 injuries 6:2 injury 3:19 inmates 6:24 instance 6:1,13 instructed 6:25 7:16 insubordination 7:14 intended 7:24 intense 4:13,18 interested 9:13 interpreted 7:12 invoking 5:12 involved 4:18 issue 5:1,2,6 8:15</p> <hr/> <p>J</p> <p>James 1:7 2:20 5:22 Jersey 1:2,21 2:6 2:8,13,16,22 9:5,20 JOHN 1:16 judge 3:1,3,4 4:3 4:5,17,20,22 5:16 judgment 5:2,7 5:8 8:23 jury 4:1,25</p> <hr/> <p>K</p> <p>KENNETH 2:21 key 4:6 know 3:23 4:22 5:14</p> <hr/> <p>L</p> <p>laid 6:23 law 5:3,4,9 8:23 LAWRENCE 2:12</p>	<p>LAZZARO 2:20 license 2:5 lie 3:11 6:8,16 6:20 7:11,15 lieu 5:15 LINDSAY 2:11 2:12 Litigation 1:6 local 3:6 5:13 LOUGHRY 2:11 Lozier 2:21 3:4 3:5</p> <hr/> <p>M</p> <p>maintained 5:5 maintaining 6:13 manner 8:18 MARKET 2:12 Master 1:6,16 Mastroianni 1:20 2:4 9:3,19 matter 1:4 2:4 5:2 8:23 mattress 6:11 means 7:18 medical 3:18 mind 7:11 minimal 3:12 misinterpretat... 8:3,5 month 4:19 motion 3:6 5:11 moved 6:17 murder 7:9</p> <hr/> <p>N</p> <p>N 2:10 necessary 7:19 neither 9:9,11 New 1:2,21 2:6,8 2:13,16,22 9:4 9:20 NORTH 2:16 Notary 2:6 9:3</p>	<p>9:20 note 5:21 number 2:5</p> <hr/> <p>O</p> <p>O 2:4 9:3,19 objective 3:18 observed 5:22 October 9:21 officer 3:12 4:9 4:10 7:9,12,18 8:3 officers 6:22 once 3:9,22 7:22 opinion 5:14,15 Opinion/Report 1:5 oral 5:14 order 7:20,23</p> <hr/> <p>P</p> <p>P 2:10,10 pain 4:13,16,18 8:8 part 4:24 particularly 7:8 parties 9:11 party 4:25 5:1,3 PC 2:19 penalogical 3:14 permanent 3:19 phrased 3:22 Pike 1:21 2:16 pillow 6:24 place 7:5 9:8 plaintiff 3:24 4:13 PLAINTIFFS 2:14,18 plaintiff's 3:8,17 4:21 planning 7:25 Plaza 2:7 plenary 5:13 8:13 point 7:19</p>	<p>points 4:6 position 4:21 6:14,20 preparing 7:11 presentation 5:19 presented 3:2 prior 3:9 4:8 Prison 1:5 problem 3:21 Procedure 4:23 5:20 8:25 proceedings 2:3 prolonged 6:1 property 6:10 6:12,18 7:2 Public 2:6 9:3,20 punishment 8:9 purpose 3:14 8:7 pursuant 3:6 8:13 put 5:24 6:14 putting 6:19</p> <hr/> <p>Q</p> <p>quasi 8:9 questions 5:24 quite 3:13 quote 4:24</p> <hr/> <p>R</p> <p>R 2:10 9:1 Ray 2:15 3:1,3 4:4,5 reason 8:1 reasonable 6:12 recited 8:11 recommendati... 8:21,22 Regard 1:4 relative 9:10,12 relevant 4:24 remained 7:3 remarks 5:17 render 5:6 reporter 2:5</p>	<p>5:16 9:4 Reporting 1:20 required 5:9 residual 4:16 6:2 resistance 4:12 respect 5:3 response 8:5 rested 8:15 result 3:12 7:25 return 6:4 reviewed 5:18 revision 5:16 right 4:3 RODNEY 2:15 rolling 7:6 ROSELLI 2:19 rule 3:6 4:22 5:10,13,19 8:13,25 Rules 4:23 5:19</p> <hr/> <p>S</p> <p>S 2:10 sadistically 8:7 screen 5:23 seated 7:4,4 seek 5:24,25 SEPTEMBER 1:13 serves 6:3 set 9:8 short 6:21 Shorthand 9:4 single 6:3 sitting 6:13 SOG 6:22 SOGs 7:1,13 somewhat 7:1 South 1:21 Special 1:6,16 SQUARE 2:22 standing 7:10 standpoint 4:17 State 1:5 2:6,21 9:4,20 states 1:1 2:7</p>
--	---	--	---	---

September 30, 2008

12

4:23 5:14 stenographica... 9:7 stomach 6:23 stood 7:7 STREET 2:12 struck 4:8,10,14 7:22 Subdivision 5:10 submit 5:16 subservient 6:14 supported 5:8 surprised 7:23 sustained 8:19 sweeping 7:2 swiftly 7:1	U uncertainty 7:15 undertook 6:12 unit 6:5 United 1:1 2:7 units 7:13 unreasonable 7:18 8:4,5	1337 2:21 2 2008 1:13 9:21 2010 9:20 251 1:21 3 30 1:13 30X100085700 2:5 32 2:16 33 2:21 330 2:12 5 5 9:20 52C 3:6 52(c) 4:22 5:19 8:13,25 52.1 5:13 6 609-586-2257 2:22 8 856-232-3337 2:17 856-232-4561 2:17 856-546-1100 1:22 856-968-9201 2:13		
T T 9:1,1 taken 2:4 9:7 television 5:23 tell 3:20 testimony 3:8,17 4:7 5:22 8:17 9:6 Thank 4:2,3,5 Theresa 2:4 9:3 9:19 threats 4:12 three 3:9 6:8 time 3:5 6:21 7:8 7:16 9:7 times 3:9 6:8 told 3:8 top 6:11 trailer 3:10,10 transcribed 5:15 transcript 2:3 9:6 trial 4:24 true 9:6 TUESDAY 1:13 twice 3:10 two 4:14,16 7:9	V valid 3:13 victim 6:6 Videoconfere... 1:20 violation 8:20 visiting 8:9 vs 1:8 W W 1:16 2:12 want 8:15 wasn't 6:9 7:24 way 3:23 6:14 weeks 4:14,16 We're 8:6 White 1:21 WILLIAM 1:9 wing 6:24 wit 7:8 worried 6:18 worst 3:13 written 5:15 X XIO857 9:21 0 08-4396 1:2 08012 2:16 08102 2:8,13 08106 1:21 08690 2:22 1 1 9:21 10:30 2:8			